

What Public Defenders Need to Know about Critical Race Theory

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Expectation Setting

- Know that not everything I discuss will be easy to implement or able to be implemented immediately. Academics have the luxury of dreaming of a world that could be as opposed to the one that exists. But folks in the trenches have the knowledge to better inform how to reach that end goal. This talk is to equip you with a wider knowledge base that can help inform your strategies.
- I can't cover everything that is important to you, but I can at least frame the concepts, so you know what is out there

Objectives. By the end of this session, participants will leave with:

1. A basic understanding of what Critical Race Theory is;
2. A deeper understanding of how CRT discusses structural racism, especially within the criminal system;
3. New or strengthened vocabulary and resources to incorporate the contributions of race theorists into their work

Roadmap

1. Understanding Critical Race Theory

- a. How we got here (timeline of the current tension)
- b. Overview Legal Theory Generally
- c. Mississippi SB 2113

2. Structural Racism

- a. Examples of fighting against structural racism and implicit bias in criminal cases

3. Resources

Understanding CRT

1. Timeline and the Current Tension
2. Overview of Legal Theories and Description of CRT
3. MS SB 2113

“Anti-CRT” Timeline

- 1980s. Critical Race Theory solidified in the legal academy.
- February 26, 2012. Trayvon Martin is killed.
- July 2013. #BlackLivesMatter movement is born.
- August 14, 2019. **1619 Project**. New York Times.
- May 25, 2020. George Floyd is murdered. Protests follow. DEI, cultural competency efforts increase around the country/the world.
- September 28, 2020. Trump Executive order on Race/Sex Stereotyping
- November 2020. Trump Executive order on **1776 Commission**.
- March 15, 2021. Christopher Rufo Tweets/appears on Fox News.

1619 Project

In August of 1619, a ship appeared on this horizon, near Point Comfort, a coastal port in the British colony of Virginia. It carried more than 20 enslaved Africans, who were sold to the colonists. America was not yet America, but this was the moment it began. No aspect of the country that would be formed here has been untouched by the 250 years of slavery that followed. On the 400th anniversary of this fateful moment, it is finally time to tell our story truthfully.

The 1619 Project

1619 Project

Out of slavery — and the anti-black racism it required — grew nearly everything that has truly made America exceptional: its economic might, its industrial power, its electoral system, diet and popular music, the inequities of its public health and education, its astonishing penchant for violence, its income inequality, the example it sets for the world as a land of freedom and equality, its slang, its legal system and the endemic racial fears and hatreds that continue to plague it to this day. The seeds of all that were planted long before our official birth date, in 1776, when the men known as our founders formally declared independence from Britain.

1619. Nicole Hannah Jones.

The United States is a nation founded on both an ideal and a lie. Our Declaration of Independence, signed on July 4, 1776, proclaims that “all men are created equal” and “endowed by their Creator with certain unalienable rights.” But the white men who drafted those words did not believe them to be true for the hundreds of thousands of black people in their midst. “Life, Liberty and the pursuit of Happiness” did not apply to fully one-fifth of the country. Yet despite being violently denied the freedom and justice promised to all, black Americans believed fervently in the American creed. Through centuries of black resistance and protest, we have helped the country live up to its founding ideals. And not only for ourselves — black rights struggles paved the way for every other rights struggle, including women’s and gay rights, immigrant and disability rights.

Without the idealistic, strenuous and patriotic efforts of black Americans, our democracy today would most likely look very different — it might not be a democracy at all.

Executive Order on Race and Sex Stereotyping

Section 1. Purpose. From the battlefield of Gettysburg to the bus boycott in Montgomery and the Selma-to-Montgomery marches, heroic Americans have valiantly risked their lives to ensure that their children would grow up in a Nation living out its creed, expressed in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal.” It was this belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world. President Abraham Lincoln understood that this belief is “the electric cord” that “links the hearts of patriotic and liberty-loving” people, no matter their race or country of origin. It is the belief that inspired the heroic black soldiers of the 54th Massachusetts Infantry Regiment to defend that same Union at great cost in the Civil War. And it is what inspired Dr. Martin Luther King, Jr., to dream that his children would one day “not be judged by the color of their skin but by the content of their character.”

Thanks to the courage and sacrifice of our forebears, America has made significant progress toward realization of our national creed, particularly in the 57 years since Dr. King shared his dream with the country.

Executive Order on Race and Sex Stereotyping

Today, however, many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.

This destructive ideology is grounded in misrepresentations of our country's history and its role in the world. Although presented as new and revolutionary, they resurrect the discredited notions of the nineteenth century's apologists for slavery who, like President Lincoln's rival Stephen A. Douglas, maintained that our government "was made on the white basis" "by white men, for the benefit of white men." Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country.

Executive Order: 1776 Commission

The recent attacks on our founding have highlighted America's history related to race. These one-sided and **divisive** accounts too often ignore or fail to properly honor and recollect the **great** legacy of the American national experience -- our country's valiant and successful effort to shake off the curse of slavery and to use the lessons of that struggle to guide our work toward equal rights for all citizens in the present. **Viewing America as an irredeemably and systemically racist country cannot account for the extraordinary role of the great heroes of the American movement against slavery and for civil rights** — a great moral endeavor that, from Abraham Lincoln to Martin Luther King, Jr., was marked by religious fellowship, good will, generosity of heart, an emphasis on our shared principles, and an inclusive vision for the future.

As these heroes demonstrated, the path to a renewed and confident national unity is through a rediscovery of a shared identity rooted in our founding principles. A loss of national confidence in these principles would place rising generations in jeopardy of a crippling self-doubt that could cause them to abandon faith in the common story that binds us to one another across our differences. Without our common faith in the equal right of every individual American to life, liberty, and the pursuit of happiness, authoritarian visions of government and society could become increasingly alluring alternatives to self-government based on the consent of the people. Thus it is necessary to provide America's young people access to what is genuinely inspiring and unifying in our history, as well as to the lessons imparted by the American experience of overcoming great national challenges. This is what makes possible the informed and honest patriotism that is essential for a successful republic.

A restoration of American education grounded in the principles of our founding that is accurate, honest, unifying, inspiring, and ennobling must ultimately succeed at the local level. Parents and local school boards must be empowered to achieve greater choice and variety in curriculum at the State and local levels.

[I]t is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men – high in literary acquirements – high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

Dred Scott v. Sandford, 60 U.S. 393, 410 (1857).

Rufo Tweet



Christopher F. Rufo ✂️🔒

@realchrisrufo



Replying to @realchrisrufo and @ConceptualJames

We have successfully frozen their brand—"critical race theory"—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category.

3:14 PM · Mar 15, 2021 · Twitter Web App

Tension: What should be taught and how?

- 1619 vs 1776. When is the founding of our country? What are our founding principles? How should slavery, discrimination, and bigotry be taught? What elements should be emphasized?
- Which people are we emphasizing are important to our story as a country? How are we framing their existence? Dichotomy of hero vs villain? Recognition of complexity as necessary vs problematic?
- American ideal of individualism. Is that threatened if systemic racism is acknowledged? What are the consequences of acknowledging systemic racism and implicit bias if they are not grounded in personal responsibility? Could be scary to some.

Mississippi SB 2113 (signed into law March 2022)

SECTION 1. The following shall be codified as Section 37-13-2, Mississippi Code of 1972:

37-13-2. (1) No public institution of higher learning, community/junior college, school district or public school, including public charter schools, shall **direct or otherwise compel students to personally affirm, adopt or adhere to any of the following tenets:**

(a) That any sex, race, ethnicity, religion or national origin is inherently superior or inferior; or

(b) That individuals should be adversely treated on the basis of their sex, race, ethnicity, religion or national origin.

(2) No public institution of higher learning, community/junior college, school district or public school, including public charter schools, shall make a distinction or classification of students based on account of race, provided that nothing in this subsection shall be construed to prohibit the required collection or reporting of demographic information by such schools or institutions.

(3) No public institution of higher learning, community/junior college, school district or public school, including public charter schools, shall teach a course of instruction or unit of study **that directs or otherwise compels students to personally affirm, adopt or adhere to any of the tenets identified in subsection (1)(a) and (b) of this section.**

Concerns with the law

- Chilling speech
- Vague: what conduct is being addressed?
- Seems to be targeting DEI and other trainings that specifically discuss race
- Includes several protected groups, but is titled “Critical Race Theory; prohibited,” does not describe Critical Race Theory
- Notably: leaves out gender and sexual orientation; MS House rejected a proposed amendment that would include gender and sexual orientation on the grounds that the equal protection clause of the 14th Amendment would apply

“Critical Race Theory”

Coined by the lawyer and scholar, Kimberlé Crenshaw.

Crenshaw is one of the founders of CRT and the scholar who coined the term “intersectionality” in the legal context. She explained that she chose the term “theory” to signify “the desire to develop a coherent account of race and law.”

As with any other school of thought, there is no one “theory” or set of solutions or methods developed by legal scholars who theorize about race.

In a nutshell

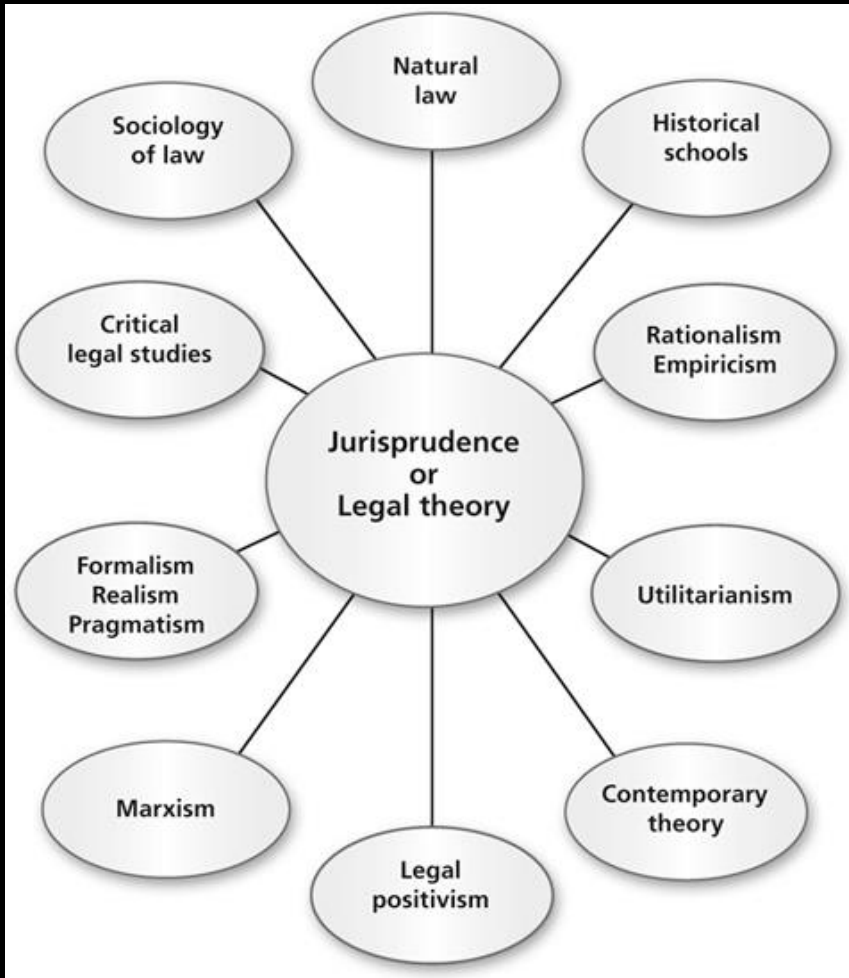
- Civil rights movement was pushing back against a more “conservative” view of race and racism. For example, segregation was considered (legally and morally) permissible by those on the “right” and (legally and morally) impermissible by those on the “left”.
 - Example: *Plessy* (separate but equal) -> *Brown* (inherently unequal)
 - Example: *Loving v. Virginia* (express racial hierarchy not a legitimate state interest)
- The civil rights movement gains embody the “liberal” tradition that Critical Race Theory pushes back against. Colorblindness, the individual bad actor, racism as a deviation from the norm instead of the way society was constructed.
- Example: “conservative” view of de jure segregation as permissible; “liberal” view of de jure segregation as impermissible; “critical” view of resulting de facto segregation as something the law should address in the form of integration/affirmative action/school district wealth redistribution as necessary to rectify past discrimination and societal resistance to desegregation efforts.

Note: scholars who theorize about race don’t all have the same conclusions about what to do about a problem.

Themes tackling race from a critical perspective that you may be familiar with

- Implicit Bias
 - Structural/Institutional/Systemic Racism
 - Microaggressions
 - Intersectionality
-
- CRT is multidisciplinary. It borrows heavily from psychology, sociology, history, and more to make arguments about how the law allows and perpetuates racial bias

Jurisprudence (Theory or Philosophy of Law)



The philosophy of law is known as “jurisprudence.” Legal principles all come from somewhere. There are a variety of schools of thought that make up the web of jurisprudence (not at all limited to what is shown in the graphic on the left).

Various theories explain the value systems/objectives behind legal rules.

There are a variety of schools of thought and critical theories: Law and Economics, Law and Literature, etc. They all explore something different about how the law is created, applied, etc

Classical Legal Thought (Formalism Simplified)

- When judges are faced with a case, they find a legal rule that is appropriate for a particular situation and apply it.
 - Once you find the proper label for something (like contract, property, trespass, etc) the legal conclusion followed easily from that. "**Mechanical jurisprudence**" was the idea that judicial decisions are deduced from general rules without regard to real world conditions or consequences.
- No concern with a "right" answer (morally/socially) but what is legally, objectively right within our system of rules
- Based in the "classically liberal" (contemporary conservative) tradition. Individuals are free, law proscribes as little conduct as possible. The law is there to provide a predictable framework to remedy disputes.

Legal Realism (Simplified)

- Laws are not divorced from the people who make or interpret them.
- There is no objectivity or neutrality. Language is imprecise, judges have discretion.
- Concerned with social values.
- That judges make decisions consciously or unconsciously on personal or political biases and hunches. Realists also wanted social science and public policy to play a larger role in legal decision making.
- Example could be Plessy -> Brown v. Board. Social science mattered a lot in changing the legal rule.

Critical Legal Studies (Oversimplified)

- Extending and elaborating the more radical aspects of realism
 - the political nature of law (the ideological biases inherent in apparently neutral concepts and analyses)
 - "law as ideology" ("law is politics"),
 - the radical indeterminacy of the law ("Shared meanings, community expectations, professional customs" and more can make some decisions seem inevitable.)
 - the claim that law promotes the interests of the powerful and legitimates injustice (laws, rules, concepts, could have developed other than the ways they actually did)
 - the argument that rights rhetoric works against the common good and against the interests of the groups the rights purport to protect.
- CLS proponents believed that legal rights could serve no real role in the liberation of subordinated people – it can make marginalized people patient with the fact that rights have not actually relived them of their marginalization.

Feminist Legal Theory (Oversimplified)

- Feminism is concerned with the treatment of women in society. The main theoretical models are:
 - Formal Equality (same rights – equal pay, equal drinking age, equal employment, etc)
 - Substantive Equality - equity – equal treatment can mean unequal outcomes – affirmative action, “biology” and difference (pregnancy)
 - Nonsubordination (dominance theory) – shift focus from difference to power imbalance (systemic vs individual)
 - Difference – women's difference as potentially valuable and could improve existing law/policy (work life balance models, public support for families, better representation of women in places of power)
 - Autonomy – importance on a right itself and not just treated like others (abortion access, domestic abuse)

Critical Approaches to Feminist Theory

- Queer Theory (critical engagement with sex/gender categories – social construction of gender, sexuality)
 - Example: understanding what it means to be cisgender or transgender, questioning binaries, and tackling how housing people in jails/prisons based on their genitalia or “sex assigned at birth” leads to violence against transgender inmates
- Intersectionality (CRT)
- Masculinity Studies (allied movement – necessary to understand and address masculinity to effectively address issues relating to gender and inequality)

Critical Race Theory (Oversimplified)

- Feminism has struggled with perceptions of classism, racism. Civil rights movement has struggled with perceptions of patriarchy, classism. One of CRTs founders was Kimberle Crenshaw who developed the concept of intersectionality (in a legal context). CRT is inherently intersectional
- Asks why, with all of the gains of the civil rights movement (neutrally worded laws outlawing blatant discrimination), racial inequality still exists.
- Rejected Critical Legal Studies idea that the legal rights serve no real role in the liberation of subordinated people. Rights are meaningful to racial minorities.
- Not just black and white. There is LatCrit (Latin@/x Critical Race Theory), APACrit (Asian Pacific American), TribalCrit, DisCrit (Disability), QueerCrit, ClassCrit, Critical Race Feminism

Critical Race Theory: Important Names/Concepts

In the 1980's a group of scholars were theorizing about the way that the law maintained racial hierarchies. Some of the most influential were (and still are):

- Derrick Bell
- Kimberle Crenshaw
- Mari Matsuda
- Richard Delgado
- Cheryl Harris
- Patricia Hill Collins
- Patricia J. Williams
- Alan Freeman (white)
- Charles Lawrence III

A few critical concepts

- Interest convergence (Bell)
- Intersectionality (Crenshaw)
- “outsider” voices/subordinated voices/**voices from the bottom which have the power to create new legal concepts** (Matsuda)
- LatCrit, hate speech, **storytelling** (Delgado)
- whiteness as property (Harris)
- Black feminist theory (Collins)
- **Storytelling**, gender, race, social theory (Williams)
- Discrimination in Anti-discrimination law (Freeman)
- **Equal protection and implicit bias** (Lawrence)

Uniting Themes of CRT

1. Race as a social construct

- Asks:
 - How exactly does the law fabricate race?
 - How has the law protected racism(s)?
 - How does the law reproduce racial inequality?
 - How can the law be used to dismantle race, racism(s) and racial inequality?
- No one methodology (multidisciplinary inspirations)
- No one solution

2. Racism is a feature, not an oddity, of American society

- Uninterested with the “individual bad actor;” interested in how racism persists in the absence of a “bad actor”

3. Critiques Liberalism’s adherence to colorblindness, neutrality, objectivity

- Asserts that “race consciousness” (as opposed to colorblindness) can help dismantle systemic racism

4. Politically engaged, grounded in lived experience

Structural Racism

1. How CRT critiques neutrality, colorblindness, objectivity, "individual bad actor"
2. Within the criminal system

Systemic Racism and Neutral Laws

- Systemic Racism is generally defined by
 1. Lack of intentionality (the production of a racial hierarchy was intentional at one point, but the maintenance of that hierarchy is probably unintentional/unforeseen)
 2. Ordinary (not spectacular. Everyday decisions. Not shocking)
 3. Racially Neutral (doesn't single out a group for different treatment)
 4. No bad actor (no individual person who we can hold responsible for doing something morally blameworthy.

Critical Race Theory Critiques “Neutral” Laws

Washington v. Davis (1976): Courts will only find a violation of equal protection when government laws or policies that disproportionately harm racial minorities have both

- (1) discriminatory intent and
- (2) discriminatory effect.

The effect of this case is to entrench the “bad actor” requirement of liberal, legal doctrine.

The court noted that overturning cases based on disproportionate effect alone would “invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black man than to the more affluent white.”

Critical Race Theory Critiques “Neutral” Laws

- *McCleskey v. Kemp (1987)*. Reaffirmed *Davis* in the death penalty context.
- Statistics showed that Georgia’s legal system was far more likely to impose capital punishment in cases with a white victim and black defendant rather than cases with black victims. Justice Powell said that accepting evidence of racial disparity would force the court to reconsider “the principles that underlie our entire criminal justice system.”

From NAPD: Importance of Race Consciousness

- On jury selection and bail: "Raising the issue repeatedly has changed the dynamic in court. The first time you raise it, you are the outlier. By the 4th time, the dynamic has been changed."
- Jurors will make assumptions based upon who they trust, who they believe. Studies show that **where race is explicit, where it is talked about, it is less of an issue. If there is no mention of race, that is where [there is] a greater risk of implicit bias.** Implicit bias is found even among the capital defense bar taking the implicit bias test.


Example of commitment to objectivity, colorblindness

- United States v. Easley, 911 F.3d 1074, 1082 (10th Cir. 2018)

Issue: Should a defendant's race be a factor that is taken into account in the totality of the circumstances when determining whether an individual would feel free to terminate an encounter with law enforcement?

- District court considered race as a factor. 10th Circuit said that was inappropriate.

From the amicus brief filed by National Association of Public Defense.
Author and Pro Bono Counsel: Patricia Roberts, William & Mary
Appellate and Supreme Court Clinic; Tillman Breckenridge, Bailey &
Glasser LLP

In determining that race is a relevant contextual factor, the district court applied the Supreme Court's reasoning for considering age in the totality of the circumstances. The district court correctly analogized the Supreme Court's consideration of age to its own consideration of race in this case because it involves a personal characteristic that affects interactions ^{*7} between members of the class and police. ² Indeed, race should be a stronger factor than age because of the concerns that cause the class to be less likely to feel free to leave an interaction. While a child's feeling may be based on a sense of authority of the officer, African-Americans' concerns are rooted in a centuries-long history of abuse that remains extant today with disproportionate incidents of abuse of power, injury, and death of African-Americans at the hands of law enforcement. See *infra* Part II. Race, like age, is not necessarily “a determinative, or even significant factor in every case, . . . [but] [i]t is, however, a reality that courts cannot simply ignore.” *J.D.B.*, 564 U.S. at 277. Thus, “just as youth or age may impact a court's ^{*8} understanding of the circumstances, this Court must consider race to fully apprehend the encounter between Ms. Easley, the only black passenger on the bus, and SA Perry, a white officer.”  [*United States v. Easley*, 293 F. Supp. 3d 1288, 1307 \(D.N.M. 2018\)](#).

Taking race into account as one factor among many enables the totality of the circumstances approach of the “free to terminate” analysis to accurately reflect the reality facing people of color in the United States. “Race . . . matters because of persistent racial inequality in society -- inequality that cannot be ignored and that has produced stark socioeconomic disparities.” See, e.g., *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

[R]ecognizing race validates the lives and experiences of those who have been burdened because of their race. . . . [C]olorblindness seeks to deny the continued social significance of the category, to tell blacks that they are no different from whites, even though blacks as blacks are persistently made to feel that difference.

T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Colum. L. Rev. 1060, 1087 (1991). In the context of the “free to terminate” analysis, ^{*9} considering race as a factor in the totality of the circumstances enables courts to reflect reality: people of color have a different relationship with law enforcement that impacts whether they will feel free to terminate a police interaction.

10th Circuit Opinion Rejecting the Argument

Requiring officers to determine how an individual's race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law. As the government notes, there is no easily discernable principle to guide consideration of race in the reasonable person analysis. Aplt. Br. at 16–17. There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population. Thus, there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures. This distinguishes race from the Supreme Court's consideration of age in the reasonable person analysis in [J.D.B. v. North Carolina](#), 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). In [J.D.B.](#), the Court noted that age is distinct from subjective considerations because it is readily discernible by police and any considerations apply broadly to children as a class. [Id.](#) at 272, 131 S.Ct. 2394. In addition, the considerations applicable to children are “self-evident to anyone who was a child once himself, including any police officer or judge,” eliminating the necessity of conjecture about the effect age has on one's perception of freedom to leave. [Id.](#) In contrast, consideration of race undermines one of the chief benefits of an objective test for search and seizure law, namely, the ability it gives law enforcement to know ex ante what conduct implicates the Fourth Amendment. [See, e.g., id.](#) at 271, 131 S.Ct. 2394 (“The benefit of the objective custody analysis is that it is ‘designed to give clear guidance to the police.’ ” (quoting [Yarborough v. Alvarado](#), 541 U.S. 652, 668, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004))). Furthermore, as the government correctly notes, a seizure analysis that differentiates on the basis of race raises serious equal protection concerns if it could result in different treatment for those who are otherwise similarly situated. Aplt. Br. at 30–31. In short, the categorical consideration of race in the reasonable person analysis is error, and we reject Ms. Easley's argument to the contrary.

Opinion and Amicus that provide great arguments for how the system is structurally racist and juries are implicitly biased

- State v. Robinson, 375 N.C. 173 (2020)
- Amicus filed by the NAPP [available in resources]
- Black Codes – could not serve as jurors; local jurisdictions excluding blacks from jury pool
- Facially neutral exclusions from jury: taxes, literacy tests, separate but equal
- Oppressive beliefs manifested in lynching, disproportionate application of death penalty, exclusion from juries
- Peremptory challenges next tool – “Top Gun” training teaching how to articulate facially neutral reasons for striking black jurors; asking jurors different questions than other jurors

Amicus on Implicit Bias and Structural Racism

Law, 30 Crime and Just. 283 (2003). Thus, as this Court has stated, the “integrity of the judicial system is at stake” when racial bias infects jury selection; that bias “entangles the courts in a web of prejudice and stigmatization [and] put [s] the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law.” *State v. Cofield*, 320 N.C. 297, 303-304, 357 S.E.2d 622, 625-27 (1987).

These problems intensified after the Civil Rights era of the mid-twentieth century. With the dismantling of overt, de jure practices that maintained white supremacy, race prejudice took more covert, indirect forms that impede progress toward racial equality. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 Am. Soc. Rev. 465, 470 (1997). Today, no one - no matter what their racial identity - can be free of racism, because it is too deeply ingrained in the structure of our society. Michael Omi and Howard Winant, *Racial Formation in the United States* 266 (3rd Ed. 2015). As the NCCAL Report to this Court stated, everyone is susceptible to implicit biases, that is, attitudes and stereotypes that unconsciously affect an individual's understanding, actions, and decisions in all aspects of life. NCCAL Report, *supra*; see also *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring) (racial bias “may be invisible even to the prosecutor exercising the challenge”); see generally Cheryl Staats et al., *State of the Science: Implicit Bias Review, Race and Ethnicity Views from Inside the Conscious Mind* (Kirwan Institute, 2017). Thus, decisions to live in a particular neighborhood, send children to a particular school, or hire particular workers have racial undertones, as historical patterns of systematic government-supported and private racism shape not only the context within which such decision making occurs but also the minds and hearts that make those decisions. Bonilla-Silva, *supra* at 470 n. 21.

The result is structural racism, “a comprehensive system of advantages and disadvantages - economic, political, cultural, and psychological” that suffuses U.S. society. Omi and Winant, *supra*. Tackling structural racism requires coordinated effort to encourage antiracist behaviors and practices across realms of work, school, politics, law, family, and culture. *Id.* However, such coordinated efforts require acknowledgment that structural racism exists. Unfortunately, individuals and institutions often react defensively to evidence that racist attitudes are widely held and fostered. See generally Robin Diangelo, *White Fragility* (2018).

Amicus on Implicit Bias and Structural Racism

Report”). Unfortunately, by framing analysis in terms of intentional racism, Batson promotes defensiveness and resistance which, in turn, impede remediation and prevention. See *Robinson* Order, ¶ 228 (citing prosecutor affidavits swearing to purportedly race-neutral reasons for strikes that are flatly contradicted by the record); *Foster*, 195 L.Ed.2d at 14-16 (rejecting “false” explanations prosecutor presented to trial court); *Miller-El*, 545 U.S. at 265 (proffered prosecutor explanations “are so far at odds with the evidence” as to reveal “the very discrimination [they] were meant to deny”). Defensiveness and resistance also feed backlash and regression. See Gen. Assembly of the Commonwealth of Penn., Joint State Gov't Comm'n, *Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee* 66-67 (June 2018) [hereinafter “*Capital Punishment in Pennsylvania*”] (noting that the success of North Carolina's Racial Justice Act “might have contributed to its repeal.”) Attempts to turn back the clock by reinstating the death sentences in these cases exemplify such regression and backlash.

Anticipating similar hostility toward identification and remediation of racial bias in criminal legal systems, the Ohio Supreme Court Commission cited above “strongly urge[d]” the state Supreme Court and Bar Association to

require that the members of the legal profession put the issue of racial fairness on their professional agendas ... to force this discussion out into the open and to keep it there until the juxtapositioned attitudes of the criminal justice system and the disaffected minority community are addressed and reconciled.

Resources

Critical Race Theory

A Primer

Khiara M. Bridges



FOUNDATION
PRESS

I've included a couple of chapters in the resources.

This highly-readable primer on Critical Race Theory (CRT) examines the theory's basic commitments, strengths, and weaknesses. The book can be used by any reader seeking to understand the relationship between constructions of race and the law.

The text consists of four Parts.

Part I provides a history of CRT.

Part II introduces and explores several core concepts in the theory—including institutional/structural racism, implicit bias, microaggressions, racial privilege, the relationship between race and class, and intersectionality.

Part III builds on Part II's discussion of intersectionality by exploring the intersection of race with a variety of other characteristics—including sexuality and gender identity, religion, and ability.

Part IV analyzes several contemporary issues to which CRT speaks—including racial disparities in health, affirmative action, the criminal justice system, the welfare state, and education.

CRITICAL RACE JUDGMENTS

REWRITTEN
U.S. COURT OPINIONS
ON RACE AND
THE LAW

Edited by Bennett Capers, Devon W. Carbado,
R. A. Lenhardt, and Angela Onwuachi-Willig

By re-writing US Supreme Court opinions that implicate critical dimensions of racial justice, Critical Race Judgments demonstrates that it's possible to be judge and a critical race theorist.

Specific issues covered in these cases include the death penalty, employment, voting, policing, education, the environment, justice, housing, immigration, sexual orientation, segregation, and mass incarceration. While some rewritten cases – Plessy v. Ferguson (which constitutionalized Jim Crow) and Korematsu v. United States (which constitutionalized internment) – originally focused on race, many of the rewritten opinions – Lawrence v. Texas (which constitutionalized sodomy laws) and Roe v. Wade (which constitutionalized a woman's right to choose) – are used to incorporate racial justice principles in novel and important ways. This work is essential for everyone who needs to understand why critical race theory must be deployed in constitutional law to uphold and advance racial justice principles that are foundational to US democracy.

Revisit the National Association for Public Defense

- Blog Post on Racial Justice has some good ideas
https://www.publicdefenders.us/blog_home.asp?display=734
- Helpful information for *Batson* challenges
 - *Foster v. Chatman*, 578 U.S. 488 (2016) (proving discriminatory intent by getting the DA's file that showed the prosecutor highlighted black jurors who were then struck peremptorily)
- Selective Prosecution
 - Example motions on selective prosecution. Make a motion to get evidence that can be used to demonstrate an inference of bias like government statistics.
- BluePrint for Racial Justice
https://sflawlibrary.org/sites/default/files/Racial%20Justice%20Blueprint_1.pdf

Bryan Scott Ryan, Alleviating Own-race Bias In Cross-racial Identifications , 8 Washington University Jurisprudence Review 115 (2015). **Copy available in resources**

- Courts often assume that an understanding of racial discrimination and prejudice fall “within the ambit of jurors’ general knowledge and life experience.” But this is false. Bias is complex and jurors misunderstanding is clear from the data.
- Part I will discuss the general frailty of eyewitness testimony and, more specifically, cross-racial identifications.
- Part II will address the four commonly proposed solutions to alleviate the cross-racial misidentifications: (1) excluding eyewitness testimony entirely; (2) relying on traditional safeguards of justice, e.g., cross-examination and summation; (3) utilizing expert testimony; and (4) implementing cautionary jury instructions. Part II will conclude that, balancing the beneficial effects of the solution per ordinariness with the willingness of the judiciary to enact a proposed remedy, cautionary jury instructions are the most feasible solution.
- Part III will analyze current cross-racial identification jury instructions and argue that **future cautionary instructions should: (1) be mandatory in all cases where a cross-racial identification occurs; (2) use objective language; and (3) be administered separate from the general eyewitness testimony instruction and prior to the testimony which includes the cross-racial identification.**

Implicit bias

- Kristian Lum, Chesa Boudin and Megan Price. [The Impact of Overbooking on a Pre-Trial Risk Assessment Tool](#). Proceedings of FAT*2020: The ACM Conference on Fairness, Accountability, and Transparency.
- "Pre-trial risk assessment tools are used to make recommendations to judges about appropriate conditions of pre-trial supervision for people who have been arrested. Increasingly, there is concern about whether these models are operating fairly, including **concerns about whether the models' input factors are fair measures of one's criminal activity**. In this paper, we assess the impact of booking charges that do not result in a conviction on a popular risk assessment tool, the Arnold Public Safety Assessment. Using data from a pilot run of the tool in San Francisco, CA, we find that booking charges that do not result in a conviction (i.e. charges that are dropped or end in an acquittal) increased the recommended level of pre-trial supervision in around 27% of cases evaluated by the tool."

Implicit bias

- Justin D. Levinson, Robert J. Smith, Koichi Hioki. [Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America.](#) Vol 53, U. C. Davis Law Review, pp. 839-891.
- "The study we present in this Article demonstrates that the core support for retribution's use has been shaken by implicit racial bias. Our national empirical study, conducted with over 500 jury-eligible citizens, shows that **race cannot be separated from the concept of retribution itself**. The study finds, for example, that Americans automatically associate the concepts of payback and retribution with Black and the concepts of mercy and leniency with White. Furthermore, the study showed that the level of a person's retribution-race implicit bias predicted how much they supported retribution as a desirable punishment rationale — the stronger the anti-Black implicit racial bias they held, the more likely they were to harbor retributivist views of criminal punishment."

Implicit Bias – Great summary of the different types of bias and how to combat them from a presenter point of view

- Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. Davis L. Rev. 1039 (2018):

As such, I offer a few tips, rooted in the psychological literature, that may prove helpful to law professors of color in augmenting and enhancing their teaching evaluations: Prime students with watermarks of white faces in PowerPoint slides to reduce their level of frustration in class.²²² Prime students with the first names of positively regarded blacks (e.g., Martin) and negative whites (e.g., Adolf) in hypotheticals to reduce levels of implicit race bias.²²³ Dress the part; law professors should wear the lawyer's uniform to maintain a look of professionalism.²²⁴ Conform to the teaching styles of the majority of

Resources

- David Simson, Exclusion, Punishment, Racism and Our Schools: a Critical Race Theory Perspective on School Discipline, 61 UCLA Law Review 506 - 563 (January, 2014)
 - Part I. Societal problems associated with zero tolerance policies. Data on school discipline.
 - Part II. Use of CRT to explain why there is racial disproportionality in school discipline. Racial stigma, implicit bias, “seemingly objective standards” appropriate behavior, and disproportionate discipline on minority students.
 - Part III. Restorative Justice.

Theorizing Social Background

- Richard Delgado, Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation, 3(1) LAW & INEQ. 9 (1985).

Available at: <https://scholarship.law.umn.edu/lawineq/vol3/iss1/2>

Annotated Bibliography: Race and the Defender

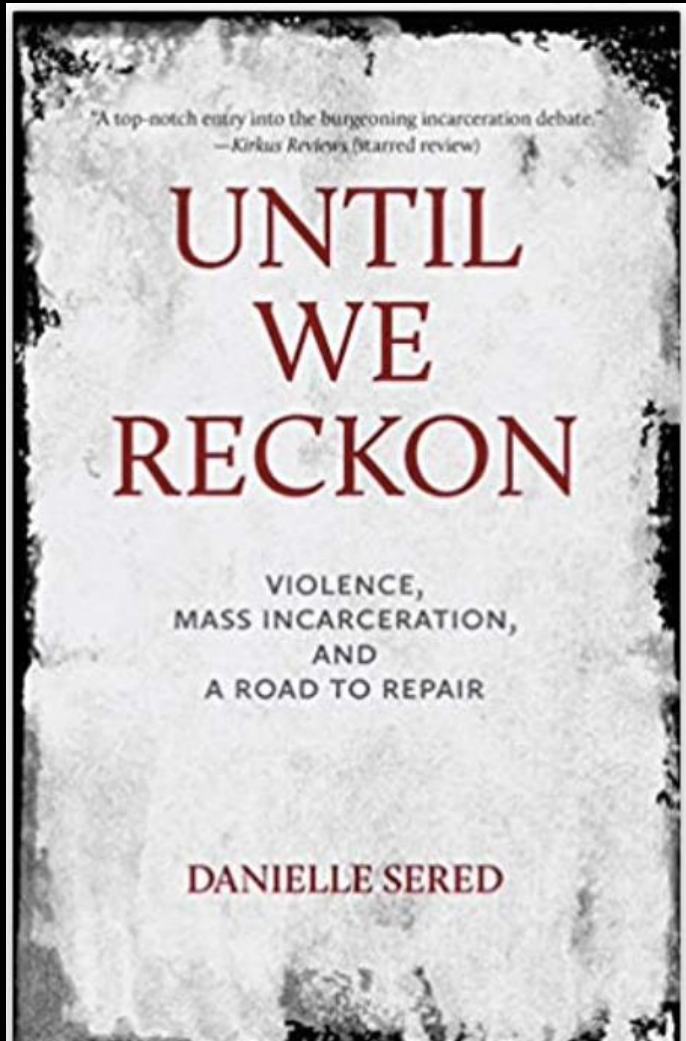
- https://www.opd.wa.gov/documents/00544-2018_R-RaisingRace.pdf
- Provides many examples of defenders raising racial justice arguments and articles that may be helpful in crafting racial justice arguments

Principle 12: Public Defense Providers Must Address Disparate Treatment of Racial and Ethnic Minorities in the Justice Systems

- https://www.publicdefenders.us/blog_home.asp?display=531 (National Association for Public Defense Founding Principles)

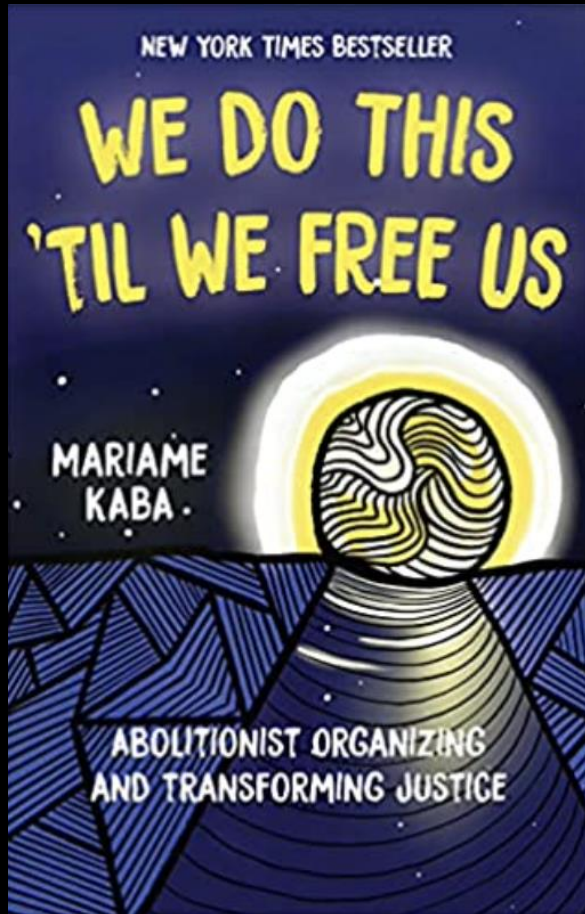
Racial and ethnic bias persists in our criminal justice systems and leads to disparate outcomes at every stage of the process, impacting persons who are stopped, arrested, released pretrial, sentenced to probation, paroled, and who receive the death penalty or life without parole. Racial and ethnic bias also is present throughout juvenile justice systems, impacting persons transferred to adult court, placed in diversion programs, and committed to custody. These outcome differences undermine fairness in our criminal and juvenile justice systems and prevent the achievement of equal justice under law. Justice systems must openly embrace gathering data on racial and ethnic bias and take bold and continuous steps to address the problem. **Public defense providers and lawyers, as well as other defense professionals, must examine their own practices and outcomes to ensure that effects of race and ethnicity, including implicit bias, are eliminated. To eradicate racial disparities, providers require the capacity and funding to challenge systemically racial and ethnic bias in criminal and juvenile justice systems.**

Violent Crime and Penal Abolition



Danielle Sered leads the award-winning Brooklyn-based Common Justice, which develops and advances solutions to violence that meet the needs of those harmed and advance racial equity without relying on incarceration.

Transformative Justice. Penal Abolition. Addresses violence and sexual violence

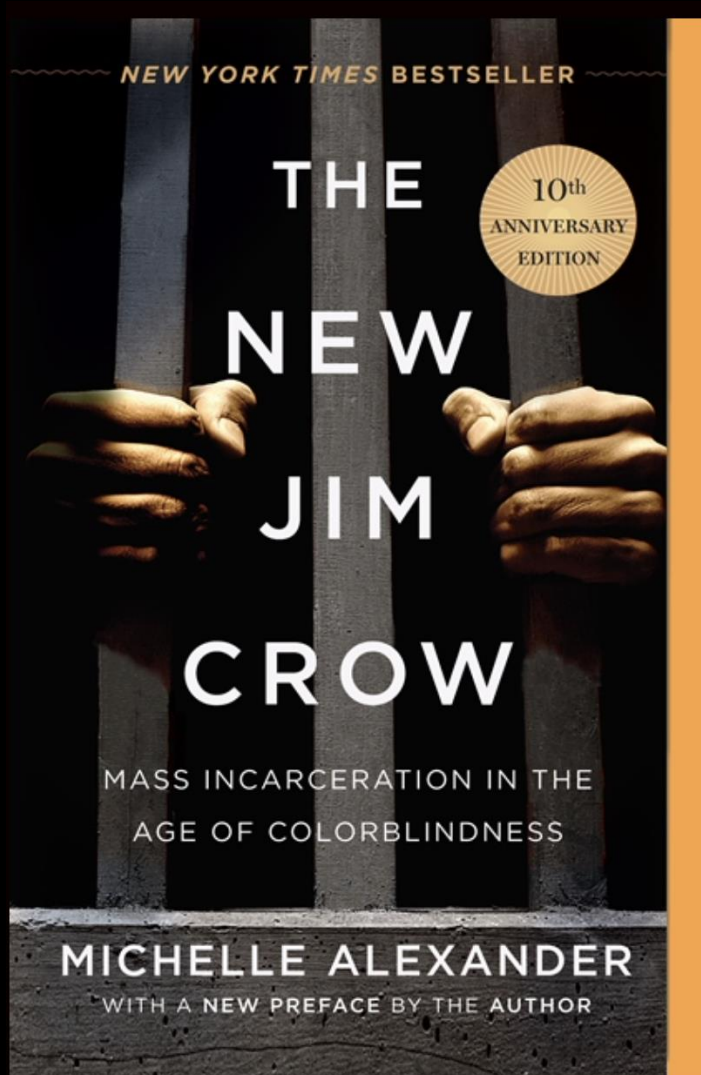


“Organizing is both science and art. It is thinking through a vision, a strategy, and then figuring out who your targets are, always being concerned about power, always being concerned about how you’re going to actually build power in order to be able to push your issues, in order to be able to get the target to actually move in the way that you want to.”

What if social transformation and liberation isn’t about waiting for someone else to come along and save us? What if ordinary people have the power to collectively free ourselves? In this timely collection of essays and interviews, Mariame Kaba reflects on the deep work of abolition and transformative political struggle.

With a foreword by Naomi Murakawa and chapters on seeking justice beyond the punishment system, transforming how we deal with harm and accountability, and finding hope in collective struggle for abolition, Kaba’s work is deeply rooted in the relentless belief that we can fundamentally change the world. As Kaba writes, “Nothing that we do that is worthwhile is done alone.”

But also check out



https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-87-1-Forman_Jr.pdf

James Foreman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*: Downplaying violent crime when seeking an end to mass incarceration is a mistake. It needs to be tackled head on.

James Foreman on Juveniles, Violent Crime, and Alternatives to Incarceration

- David Domenici & James Forman, Jr., *What It Takes To Transform a School Inside a Juvenile Justice Facility: The Story of the Maya Angelou Academy*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 283, 283–85 (Nancy E. Dowd ed., 2011) (discussing an effort to improve a school within a juvenile justice facility).
- James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 150, 151 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that aggressive criminal justice policies, including racial profiling, have affected communities of color disproportionately);
- James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1 (2004) (arguing that community policing efforts are undercut because the efforts leave youth out of the model);
- James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009) (arguing that the expansiveness and harshness of mass incarceration have contributed to even more drastic War on Terror policies);
- James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1006–09 (2010) (reviewing PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009)) (discussing the adverse effects of prison conditions on both inmates and the community at large).

THANK YOU!

- If you need assistance accessing any articles, please feel free to contact me. I am happy to assist.
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